



## TABLE OF CONTENTS

I.	Introduction.....	1
II.	Background.....	2
	A.    The claims currently set for trial.....	2
	B.    The State’s 27A Okla. Stat. § 2-6-105(A) claim .....	2
III.	Legal Standard .....	8
IV.	Argument .....	10
	A.    Evidence pertaining to conduct in Arkansas is relevant to the State’s 27A Okla. Stat. § 2-6-105 claim. ....	11
	B.    Evidence pertaining to the scope of the injury to waters of the State is relevant to the State’s 27A Okla. Stat. § 2-6-105 claim. ....	13
	C.    Evidence related to remedial alternatives is relevant to the State’s 27A Okla. Stat. § 2-6-105 claim. ....	14
	D.    Bifurcation would not further convenience, expedition or judicial economy in the trial of this matter. ....	15
V.	Conclusion .....	16

## TABLE OF AUTHORITIES

### Cases

<i>AG Equipment Co. v. AIG Life Insurance Co., Inc.</i> , 2009 U.S. Dist. LEXIS 6610 (N.D. Okla. Jan. 29, 2009) .....	9
<i>Burlington Northern &amp; Santa Fe Railway Co. v. Grant</i> , 505 F.3d 1013 (10th Cir. 2007) .....	3, 4
<i>Bynum v. Cavalry Portfolio Servs., L.L.C.</i> , 2006 U.S. Dist. LEXIS 21290 (N.D. Okla. Apr. 13, 2006) .....	6
<i>City of Tulsa v. Tyson Foods, Inc.</i> , 258 F. Supp. 2d 1263 (N.D. Okla. 2003) .....	6
<i>DeLeye v. Wisby</i> , 1986 U.S. Dist. LEXIS 17661 (D. Kan. Nov. 14 1986) .....	9
<i>In re Bayside Prison Litigation</i> , 157 Fed. Appx. 545 (3d Cir. 2005) .....	9, 10
<i>Jones v. Stotts</i> , 59 F.3d 143 (10th Cir. 1995) .....	6
<i>Schipper v. BNSF Railway Co.</i> , 2008 U.S. Dist. LEXIS 100793 (D. Kan. Dec. 12, 2008) .....	9
<i>Trujillo v. American Family Mutual Insurance Co.</i> , 2009 U.S. Dist. LEXIS 13381 (D. Utah Feb. 20, 2009) .....	9
<i>United States v. Jackson</i> , 54 Fed. Appx. 925 (10th Cir. 2003) .....	10

### Statutes

27A Okla. Stat. § 2-1-102(12) .....	3, 4, 13
27A Okla. Stat. § 2-6-105 .....	passim

### Rules

Fed. R. Civ. P. 42(b) .....	8, 9, 11
-----------------------------	----------

### Other Authorities

Wright & Miller, <i>Federal Practice &amp; Procedure</i> , §§ 2388, 2390 .....	9
--	---

COMES NOW the Plaintiff, the State of Oklahoma (“the State”), and responds to "Defendants' Motion to Structure the Mode and Order of Presentation of the Case to Separate Jury Issues from Equitable Issues" [DKT #2552].

## **I. Introduction**

Defendants propose to bifurcate the trial of this case between the issue of Defendants' liability for violations of 27A Okla. Stat. § 2-6-105 and all other issues in this case. Defendants' proposal is based primarily on the premise that certain categories of evidence relevant to the other issues in the case are irrelevant to the State's 27A Okla. Stat. § 2-6-105 claim.<sup>1</sup> That premise is incorrect. Contrary to Defendants' assertions, the overwhelming majority of the evidence pertaining to the State's other remaining claims in this case is also relevant to showing violations of 27A Okla. Stat. § 2-6-105. For example, Defendants assert that Arkansas-based conduct is irrelevant to proof of the State's 27A Okla. Stat. § 2-6-105 claim. However, while the State agrees that Arkansas-based conduct cannot itself be a violation of 27A Okla. Stat. § 2-6-105, Arkansas-based conduct and knowledge can be a basis for finding that Oklahoma-based conduct is a violation of 27A Okla. Stat. § 2-6-105, and therefore Arkansas-based conduct and knowledge is relevant to establishing whether there has been a violation of 27A Okla. Stat. § 2-6-105. Likewise, Defendants assert that evidence concerning the scope of the injury to waters of the State from poultry waste is irrelevant. However, Defendants' assertion ignores the fact that the scope of injury from poultry waste figures prominently in the definition of "pollution" and therefore is relevant to whether there is a violation of 27A Okla. Stat. § 2-6-105. Thus, once the

---

<sup>1</sup> As an initial matter, the State objects to Defendants' Motion on the ground that it is entirely lacking in foundation. Defendants' Motion is premised on Defendants' *ipse dixit* that certain categories of evidence are irrelevant (which they are not) without ever having brought and succeeded on a motion in limine to exclude such evidence. A motion to bifurcate should not be used as a vehicle to backdoor unfounded and untimely motions in limine that should have been filed in early August under the Court's scheduling order.

error of the premise that underlies Defendants' Motion is understood, it becomes readily apparent that bifurcation of the trial of this case will not promote any convenience for the Court or the parties, will not result in any judicial economy, and will not avoid any potential for prejudice. Therefore, Defendants' Motion should be denied.

## **II. Background**

### **A. The claims currently set for trial**

The following claims are currently set for trial beginning on September 21, 2009:

(1) Count 3 (RCRA); (2) Count 4 (injunctive relief under common law nuisance and nuisance *per se*); (3) Count 5 (injunctive relief under federal common law nuisance); (4) Count 6 (injunctive relief under trespass law for conduct occurring in Oklahoma and Arkansas); and (5) Count 7 (civil penalties and injunctive relief under 27A Okla. Stat. § 2-6-105 for conduct occurring in Oklahoma and injunctive relief under 2 Okla. Stat. § 2-18.1 for conduct occurring in Oklahoma).

By its August 26, 2009 Order, this Court held that the issue of Defendants' liability for civil penalties for violations of 27A Okla. Stat. § 2-6-105 will be tried to a jury. *See* DKT #2527. The issue of whether Defendants have violated 27A Okla. Stat. § 2-6-105 is broad-reaching and encompasses virtually all aspects of the State's evidence supporting its other claims. Therefore, bifurcation is not appropriate. In order to appreciate the broad scope of evidence relevant to establishing the State's 27A Okla. Stat. § 2-6-105 claim, however, it is first necessary to understand the wide reach of 27A Okla. Stat. § 2-6-105 itself.

### **B. The State's 27A Okla. Stat. § 2-6-105(A) claim**

27A Okla. Stat. § 2-6-105(A) provides that "[i]t shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location

where they are likely to cause pollution of any air, land or waters of the state. Any such action is hereby declared to be a public nuisance." This prohibition on conduct causing pollution and conduct likely to cause pollution is both well-established and far-reaching. As explained by the Tenth Circuit, "[t]he Oklahoma Legislature's intent that conduct that causes or is likely to cause pollution be declared a public nuisance is longstanding . . . ." *Burlington Northern & Santa Fe Railway Co. v. Grant*, 505 F.3d 1013, 1025 (10th Cir. 2007). Further, "[i]t is clear that the intent of subsection A is to deem as a public nuisance conduct that either has caused or is likely to cause pollution. Accordingly, pollution need not have already occurred before conduct 'likely to cause' pollution can be deemed a public nuisance." *Id.* at 1024.

From the plain language of the statute, there are three bases of liability under 27A Okla. Stat. § 2-6-105(A). They are:

- (1) "It shall be unlawful for any person to cause pollution of any waters of the state . . . ."
- (2) "It shall be unlawful for any person . . . to place . . . any wastes in a location where they are likely to cause pollution of any . . . waters of the state."
- (3) "It shall be unlawful for any person . . . to . . . cause to be placed any wastes in a location where they are likely to cause pollution of any . . . waters of the state."

27A Okla. Stat. § 2-6-105(A).

For purposes of 27A Okla. Stat. § 2-6-105(A), the term "pollution" is broadly defined. It is a two part, disjunctive definition. *See* 27A Okla. Stat. § 2-1-102(12). First, "[p]ollution" means the presence in the environment of any substance, contaminant or pollutant, or any other alteration of the physical, chemical or biological properties of the environment or the release of any liquid, gaseous or solid substance into the environment in quantities which are or will likely create a nuisance . . . ." *Id.* (emphasis added). Additionally and alternatively, "[p]ollution"

means the presence in the environment of any substance, contaminant or pollutant, or any other alteration of the physical, chemical or biological properties of the environment or the release of any liquid, gaseous or solid substance into the environment in quantities . . . which render or will likely render the environment harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, or to property[.]”  
*Id.*

The multiple uses of the term "likely" in 27A Okla. Stat. § 2-6-105(A) and 27A Okla. Stat. § 2-1-102(12) reveal the Oklahoma Legislature's intent that this statutory scheme be liberally construed to broadly reach all actors whose conduct pollutes or threatens to pollute the waters of the State. *See Burlington Northern*, 505 F.3d at 1024 ("The primary goal of statutory interpretation is to determine and follow legislative intent. To determine legislative intent, we look at the whole act in light of its general purpose and objective. When interpreting any statute, we begin with the plain and ordinary meaning of the language employed in the text") (citations omitted).

Under the facts of this case, Defendants are liable for violations of 27A Okla. Stat. § 2-6-105(A) under each of the three bases. Such liability is both direct and vicarious.

The State will establish violations by Defendants under the first basis of liability (*i.e.*, that Defendants have caused / are causing pollution of waters of the State) by showing, for example, that:

- By placing millions of its birds in the Oklahoma portion of the IRW, together with its phosphorus-laden feed that its birds consume, without providing for the safe handling and disposal of the poultry waste generated in the course of the poultry growing operations associated with those birds and, in fact, allowing significant quantities of that poultry waste to be land-applied in the IRW where phosphorus and bacteria can and does run-off

/ leach into the waters of the State,<sup>2</sup> each Defendant has caused / is causing pollution of the waters of the State.

- By land applying poultry waste in the Oklahoma portion of the IRW or transferring poultry waste from its own poultry growing operations to a third person for land

---

<sup>2</sup> The *City of Tulsa* settlement agreement is just one of many pieces of evidence demonstrating that Defendants can dictate the handling and disposal of poultry waste. Section F.3 of the settlement agreement provides as follows:

3. From and after the date the Court enters its Order approving this Agreement, the Poultry Defendants shall not:

(a) engage in or knowingly permit the Land Application of Poultry Litter on a Company Farm (or other property owned by the Poultry Defendants) or on a Contract Grower's property in the Watershed until the property has been issued an NMP containing a PI number for each tract, field or pasture;

(b) engage in or knowingly permit the sale or transfer of any Poultry Litter produced by a Company Farm or Contract Grower in the Watershed to any other Landowner in the Watershed for Land Application until each tract, field, or pasture, and each tract of the Application Site on which the sold or transferred Litter is to be land applied has been issued an NMP containing a PI number by the WMT;

(c) engage in or knowingly permit the sale or transfer of any Litter produced by a Company Farm located outside of the Watershed to any Landowner within the Watershed for Land Application until the Landowner has been issued an NMP by the WMT, containing a PI number for each tract;

(d) continue to place birds with any Contract Grower who has been determined by the Company or the WMT to have engaged in or permitted the Land Application of Poultry Litter on his property prior to the issuance to such Grower, by the WMT, of an NMP for his property containing a PI number for each tract, and if ordered by the Court, the Poultry Defendant shall terminate or refuse to renew its contract with the Contract Grower;

(e) continue to place birds with any Contract Grower who has been determined by the Company or the WMT to have sold or transferred Poultry Litter to any Landowner within the Watershed prior to the issuance to such Landowner, by the WMT, of an NMP containing a PI number for each tract, and, if ordered by the Court, the Poultry Defendant shall terminate or refuse to renew its contract with the Contract Grower; or

(f) engage in or knowingly permit any Litter to be stored on a Company Farm or Grower's farm in the Watershed in such a manner as to allow the transport or dispersal of such Litter due to storm water runoff infiltration, wind or other natural or man made events.

See DKT #2062 (Ex. 44 at § F.3) (emphasis added).

application in the Oklahoma portion of the IRW, each Defendant having done so has caused / is causing pollution of the waters of the State in the IRW.

- Each Defendant has contracted with growers to raise poultry for it in the Oklahoma portion of the IRW. Poultry waste necessarily follows from growing poultry. Defendants know or should know that significant amounts of the poultry waste generated by these birds is land-applied in the Oklahoma portion of the IRW. Defendants know or should know that phosphorus and bacteria from this land-applied poultry waste can and does run-off from the land-application sites to the waters of the State. Each Defendant has thereby employed contract growers to do work Defendant knows or should know to be likely to involve the creation of a public nuisance by pollution. Therefore, under 427B principles, Defendant has caused / is causing pollution of the waters of the State in the IRW in each instance where a contract grower has land applied such poultry waste in the Oklahoma portion of the IRW or transferred such poultry waste to a third person for land application in the Oklahoma portion of the IRW.<sup>3</sup>
- Because of the nature of the relationship between each Defendant and its contract growers, Defendants' contract growers are Defendants' employees / agents, and the acts of its contract growers are the acts of Defendants. Therefore, under employer-employee / principal-agent principles, Defendant has caused / is causing pollution of the waters of the State in the IRW in each instance where a contract grower has land applied such poultry waste in the Oklahoma portion of the IRW or transferred such poultry waste to a third person for land application in the Oklahoma portion of the IRW.

---

<sup>3</sup> The facts underlying the State's 427B theory of vicarious liability have been extensively laid out in the summary judgment briefing. *See, e.g.*, DKT #2062. As to the specific issue of liability for contract grower transfers of poultry waste to third persons, that issue was raised by Defendants in their motion for summary judgment on Counts 7 & 8. *See* DKT #2057 at § III. The State answered this issue in its response to that motion. *See* DKT #2166 at § IV.C. The Court denied Defendants' motion. *See* DKT #2472 (Minute Sheet). Defendants raised the issue again in a motion in limine. *See* DKT #2407. This time, however, the Court ruled that 427B vicarious liability principles did not apply when contract growers transferred poultry waste to third persons. *See* DKT #2596 (Minute Sheet). That ruling is at odds with the principles and policies that underlie section 427B specifically, and the reasoning that underlies Chief Judge Claire Eagan's ruling in the *City of Tulsa* case. *See City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1296 (N.D. Okla. 2003), *vacated in connection with settlement*. Inasmuch as the Court made its erroneous ruling on this issue in the context of a motion in limine, and "all rulings in limine are, by their very nature, preliminary, and the court may change its ruling at any time for whatever reason it deems appropriate," *see Bynum v. Cavalry Portfolio Servs., L.L.C.*, 2006 U.S. Dist. LEXIS 21290, at \*14-15 (N.D. Okla. Apr. 13, 2006) (citing *Jones v. Stotts*, 59 F.3d 143, 146 (10th Cir. 1995)), the State has not addressed this issue in any detail in this response, but rather will be filing a motion of reconsideration of the Court's in limine ruling shortly.

The State will establish violations by Defendants under the second basis of liability (*i.e.*, that Defendants have placed wastes in a location where they are likely to cause pollution of waters of the State) by showing, for example, that:

- By land applying poultry waste in the Oklahoma portion of the IRW or transferring poultry waste from its own poultry growing operations to a third person for land application in the Oklahoma portion of the IRW, each Defendant having done so has placed wastes in a location -- *i.e.*, the Oklahoma portion of the IRW -- where they are likely to cause pollution of the waters of the State in the IRW.
- Each Defendant has contracted with growers to raise poultry for it in the Oklahoma portion of the IRW. Poultry waste necessarily follows from growing poultry. Defendants know or should know that significant amounts of the poultry waste generated by these birds is land-applied in the Oklahoma portion of the IRW. Defendants know or should know that phosphorus and bacteria from this land-applied poultry waste can and does run-off from the land-application sites to the waters of the State. Each Defendant has thereby employed contract growers to do work Defendant knows or should know to be likely to involve the creation of a public nuisance by pollution. Therefore, under 427B principles, in each instance where a contract grower has land applied such poultry waste in the Oklahoma portion of the IRW or transferred such poultry waste to a third person for land application in the Oklahoma portion of the IRW, Defendant has placed wastes in a location -- *i.e.*, the Oklahoma portion of the IRW -- where they are likely to cause pollution of the waters of the State in the IRW.
- Because of the nature of the relationship between each Defendant and its contract growers, Defendants' contract growers are Defendants' employees / agents, and the acts of its contract growers are the acts of Defendants. Therefore, under employer-employee / principal-agent principles, in each instance where a contract grower has land applied such poultry waste in the Oklahoma portion of the IRW or transferred such poultry waste to a third person for land application in the Oklahoma portion of the IRW, Defendant has placed wastes in a location -- *i.e.*, the Oklahoma portion of the IRW -- where they are likely to cause pollution of the waters of the State in the IRW.

The State will establish violations by Defendants under the third basis of liability (*i.e.*, that Defendants have caused / are causing to be placed wastes in a location where they are likely to cause pollution of waters of the State) by showing, for example, that:

- By placing millions of its birds in the Oklahoma portion of the IRW, together with its phosphorus-laden feed that its birds consume, without providing for the safe handling and disposal of the poultry waste generated in the course of the poultry growing operations associated with those birds, and, in fact, allowing significant quantities of that poultry

waste to be land-applied in the IRW where phosphorus and bacteria can and does run-off / leach into the waters of the State, each Defendant has caused / is causing wastes to be placed in a location -- *i.e.*, the Oklahoma portion of the IRW -- where they are likely to cause pollution of the waters of the State in the IRW.

- By land applying poultry waste in the Oklahoma portion of the IRW or transferring poultry waste from its own poultry growing operations to a third person for land application in the Oklahoma portion of the IRW, each Defendant having done so has caused / is causing wastes to be placed in a location -- *i.e.*, the Oklahoma portion of the IRW -- where they are likely to cause pollution of the waters of the State in the IRW.
- Each Defendant has contracted with growers to raise poultry for it in the Oklahoma portion of the IRW. Poultry waste necessarily follows from growing poultry. Defendants know or should know that significant amounts of the poultry waste generated by these birds is land-applied in the Oklahoma portion of the IRW. Defendants know or should know that phosphorus and bacteria from this land-applied poultry waste can and does run-off from the land-application sites to the waters of the State. Each Defendant has thereby employed contract growers to do work Defendant knows or should know to be likely to involve the creation of a public nuisance by pollution. Therefore, under 427B principles, in each instance where a contract grower has land applied such poultry waste in the Oklahoma portion of the IRW or transferred such poultry waste to a third person for land application in the Oklahoma portion of the IRW, Defendant has caused / is causing wastes to be placed in a location -- *i.e.*, the Oklahoma portion of the IRW -- where they are likely to cause pollution of the waters of the State in the IRW.
- Because of the nature of the relationship between each Defendant and its contract growers, Defendants' contract growers are Defendants' employees / agents, and the acts of its contract growers are the acts of Defendants. Therefore, under employer-employee / principal-agent principles, in each instance where a contract grower has land applied such poultry waste in the Oklahoma portion of the IRW or transferred such poultry waste to a third person for land application in the Oklahoma portion of the IRW, Defendant has caused / is causing wastes to be placed in a location -- *i.e.*, the Oklahoma portion of the IRW -- where they are likely to cause pollution of the waters of the State in the IRW.

With the understanding of the State's 27A Okla. Stat. § 2-6-105 claim that the preceding discussion allows, it will be readily apparent that bifurcating the liability proofs pertaining to this claim from the proofs pertaining to the State's other remaining claims is inappropriate.

### **III. Legal standard**

Fed. R. Civ. P. 42(b) provides the standard for bifurcation. It states in pertinent part that "[f]or convenience, to avoid prejudice, or to expedite and economize, the court may order a

separate trial or one or more separate issues, claims, crossclaims, counterclaims, or third-party claims." "Generally, 'the party seeking bifurcation has the burden of showing that separate trials are proper in light of the general principle that a single trial tends to lessen the delay, expense and inconvenience.'" *Schipper v. BNSF Ry. Co.*, 2008 U.S. Dist. LEXIS 100793, at \*3 (D. Kan. Dec. 12, 2008) (citation omitted); *see also Trujillo v. American Family Mutual Ins. Co.*, 2009 U.S. Dist. LEXIS 13381, at \*4 (D. Utah Feb. 20, 2009) ("The moving party bears the burden of convincing the court to exercise its discretion in separating a trial") (citations omitted).

"Bifurcation is not the standard in a typical case." *Id.*; *see also DeLeye v. Wisby*, 1986 U.S. Dist. LEXIS 17661 (D. Kan. Nov. 14 1986) ("Bifurcation is not routinely ordered, nor should it be") (citation omitted). "The Tenth Circuit has held that courts should not bifurcate trials . . . unless the issues to be bifurcated are 'clearly separable.'" *AG Equipment Co. v. AIG Life Ins. Co., Inc.*, 2009 U.S. Dist. LEXIS 6610, at \*5 (N.D. Okla. Jan. 29, 2009) (citation omitted). Indeed, "[i]f . . . the preliminary and separate trial of an issue will involve extensive proof and substantially the same facts or witnesses as the other issues, or if any saving in time and expense is wholly speculative, a separate trial will be denied." Wright & Miller, *Federal Practice & Procedure*, § 2388; *see also id.* at § 2390 ("[S]eparation has been denied when the evidence on the two subjects is overlapping or the liability and damages issues are so intertwined that efficiency will not be achieved or confusion may result from any attempt at separation").

Finally, rather than bifurcation, limiting instructions can be used to eliminate potential prejudice or confusion from evidence. *See, e.g., In re Bayside Prison Litigation*, 157 Fed. Appx. 545, 548 (3d Cir. 2005). As explained by the Third Circuit:

We have long held that prejudice does not arise "just because all evidence adduced is not germane to all counts against each defendant." . . . "Rather, some exacerbating circumstances, such as the jury's inability to compartmentalize the evidence, are required." Here, the District Judge expressly directed the jury to

compartmentalize the evidence, and there is no reason to believe that it was unable or unwilling to do so. . . . When such a limiting instruction is given to the jury, "we presume that the jury follows such instructions, and regard such instructions as pervasive evidence that refusals to sever did not" cause undue prejudice.

*Id.* at 548-49 (citations omitted); *see also United States v. Jackson*, 54 Fed. Appx. 925, 929 (10th Cir. 2003) ("A central assumption of our jurisprudence is that jurors follow the instructions they receive") (citations omitted).

#### **IV. Argument**

Defendants assert that bifurcation would be appropriate because, in connection with the State's proof of its 27A Okla. Stat. § 2-6-105 claim, "the jury does not need to hear" any evidence involving conduct in Arkansas, the scope of the injury to waters of the State, or remediation. *See* Motion, pp. 5-6. Defendants are wrong, and, therefore, the State objects to bifurcation of liability issues pertaining to 27A Okla. Stat. § 2-6-105 from the issues pertaining to the State's other remaining causes of action. This is because the evidence on the liability issues pertaining to 27A Okla. Stat. § 2-6-105 is inextricably intertwined, overlapping and interrelated with the evidence on the issues pertaining to the State's other remaining causes of action. As such, a bifurcated proceeding would necessitate a number of witnesses -- many of whom are out of state -- to be available twice to testify on identical or nearly identical subject matter instead of being able to complete their testimony at one time. Further, bifurcation will unnecessarily and prejudicially fracture the State's orderly presentation of its case. And finally, to the extent that there is some minor portion of the evidence that goes solely to claims other than the 27A Okla. Stat. § 2-6-105 claim, that evidence can be cabined by an appropriate limiting instruction to the jury. Thus, bifurcation will not further convenience. Nor will it avoid prejudice; rather it will prejudice the State by forcing a disjointed, repetitive presentation of its

case. And it will not be conducive to expedition and economy. Therefore, bifurcation would be inappropriate.<sup>4</sup> *See* Fed. R. Civ. P. 42(b).

**A. Evidence pertaining to conduct in Arkansas is relevant to the State's 27A Okla. Stat. § 2-6-105 claim**

Although they brought no motion in limine on the issue, Defendants now argue *ipse dixit* that "[e]vidence concerning conduct in Arkansas is irrelevant and would only serve to confuse the jury." *See* Motion, p. 7. Defendants' argument is long on generalities and short on specifics, and, more importantly, is simply wrong. As noted above, while Arkansas-based conduct cannot itself be a violation of 27A Okla. Stat. § 2-6-105, Arkansas-based conduct and knowledge can be a basis for finding that Oklahoma-based conduct is a violation of 27A Okla. Stat. § 2-6-105.

By way of example, and without limitation, evidence that poultry waste that has been land-applied in the Arkansas portion of the IRW can and does run off / leach and can and does cause pollution can be used to show that poultry waste that has been land-applied in the Oklahoma portion of the IRW can and does run off / leach and can and does cause pollution. This is because Defendants' practices, the poultry growing operations, the poultry waste characteristics, the methods and timing of poultry waste land application, the basic soil structure and geology, the predominant land uses, and the laws of gravity and other physical laws affecting fate and transport in the Arkansas portion of the IRW are the same as in the Oklahoma portion of the IRW. Thus, not only should the evidence that poultry waste that has been land-applied in the Arkansas portion of the IRW can and does run off / leach and can and does cause pollution come in, but also all of the evidence upon which that proof is predicated should come in to support all of the State's claims. Such proofs require one unified presentation. Under

---

<sup>4</sup> To the extent the Court decides to use an advisory jury, that would weigh yet further against bifurcation.

Defendants' bifurcation proposal, however, many of the State's witnesses that cover this proof will be required to testify twice.

Similarly, evidence relating to government reports and scientific research regarding poultry waste disposal practices and their impacts on water quality that were conducted in the Arkansas portion of the IRW is directly relevant to proving both violations of 27A Okla. Stat. § 2-6-105 and the State's other remaining claims. Among other things, such research demonstrates the nature of the problem caused by land application of poultry waste in the IRW, the existence of ready transport pathways, and Defendants' knowledge of the problems caused by land application of poultry waste in the IRW. Yet further, evidence relating to contributions of phosphorus and bacteria from the Arkansas portion of the IRW is relevant to evaluating water quality conditions and pollution in the Oklahoma portion of the IRW as such phosphorus and bacteria combines with phosphorus contributed in Oklahoma to produce an indivisible injury in Oklahoma. In fact, even evidence outside both the Oklahoma or Arkansas portion of the IRW for which proper foundation is laid may be relevant to proving a violation of 27A Okla. Stat. § 2-6-105. For example, it is anticipated that Dr. Chaubey will testify concerning his study of Beaver Lake, which is in northwest Arkansas and outside the IRW, and how general conclusions from this study are useful in making conclusions about run-off processes in the IRW. *See* DKT #2499, pp. 6-8.

In sum, Arkansas-based evidence that will be used to establish elements of the State's other causes of action is intertwined with the Arkansas-based evidence that can be a basis for finding that Oklahoma-based conduct is a violation of 27A Okla. Stat. § 2-6-105. Under Defendants' bifurcation proposal, the two separate trials would involve in many areas substantially the same facts, opinions and witnesses (albeit sometimes being used for different

proof purposes). No efficiency will be achieved and confusion may well result from any attempt at separation of this intertwined evidence. Defendants' broad-brush assertions do not suffice to carry their heavy burden, and fail to take into account the ability to address this issue, to the extent necessary, through limiting instructions. Therefore, Defendants' Motion should be denied.

**B. Evidence pertaining to the scope of the injury to waters of the State is relevant to the State's 27A Okla. Stat. § 2-6-105 claim**

Defendants also baldly assert that evidence pertaining to the scope of the injury to waters of the State is irrelevant to the State's 27A Okla. Stat. § 2-6-105 claim.<sup>5</sup> Specifically, they assert that "[e]vidence as to the nature and extent of the alleged harms, including but not limited to adverse health effects, changed aesthetic and recreational value as measured by historical data, and a variety of environmental impacts, is not relevant to the jury's decision of whether there have been 'violations' of 27A Okla. Stat. § 2-6-105(A)." *See* Motion, pp. 7-8. Defendants' assertion is frivolous. The concept of "pollution" is central to the application of 27A Okla. Stat. § 2-6-105(A) and to finding a violation thereunder. *See* 27A Okla. Stat. § 2-6-105(A) ("It shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state") (emphasis added). 27A Okla. Stat. § 1-1-102(12) defines "pollution" as:

the presence in the environment of any substance, contaminant or pollutant, or any other alteration of the physical, chemical or biological properties of the environment or the release of any liquid, gaseous or solid substance into the environment in quantities which are or will likely create a nuisance or which render or will likely render the environment harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, or to property[.]

---

<sup>5</sup> Again, Defendants never brought a motion in limine on this issue.

The plain language of this definition makes clear that evidence as to the nature and extent of the alleged harms, including but not limited to adverse health effects, changed aesthetic and recreational value, and a variety of environmental impacts, are a part of the definition of "pollution" and thus is directly relevant to the jury's decision of whether there have been violations of 27A Okla. Stat. § 2-6-105(A). Thus, Defendants' argument for bifurcation based on the alleged irrelevancy of the scope of the injury should be summarily dismissed.

**C. Evidence related to remedial alternatives is relevant to the State's 27A Okla. Stat. § 2-6-105 claim**

Defendants also make the broad and unsupported claim that evidence "related to remedial alternatives" is irrelevant and has the potential to confuse and potentially prejudice the jury. *See* Motion, p. 9. What Defendants mean by evidence "related to remedial alternatives" is unclear. However, much of the evidence related to actions necessary to remediate pollution caused by Defendants' waste disposal practices is the same evidence relating to the existence of pollution caused by Defendants' practices. Obviously, the existence of pollution is related to the remedial alternatives needed to abate it. Evidence on these topics will be presented by many of the same witnesses, and the evidence relating to remedial alternatives is either the same as or intertwined with the evidence that will be presented to the jury to prove the State's 27A Okla. Stat. § 2-6-105 claim. No efficiency will be achieved, and confusion may well result from any attempt at separation of this intertwined evidence.

Defendants set out a list of three of the areas that they believe are irrelevant as examples, but these areas are not a complete list of what Defendants assert are "related to remedial alternatives."<sup>6</sup> Defendants' broad-brush assertions do not suffice to carry their heavy burden.

---

<sup>6</sup> Defendants assert that the Court ruled that Mr. King's opinions are related to the Court's equitable balancing and that the opinions are irrelevant to liability. *See* Motion, p. 9.

These areas are intertwined with the evidence the State will present to prove its 27A Okla. Stat. § 2-6-105 claim and involve many of the same witnesses. To the extent there are certain discreet areas that are not relevant to the State's 27A Okla. Stat. § 2-6-105 claim, those areas can be addressed by a limited instruction.

**D. Bifurcation would not further convenience, expedition or judicial economy in the trial of this matter**

As explained above, the proofs pertaining to the State's 27A Okla. Stat. § 2-6-105 claim are not clearly separable from the proofs pertaining to the State's other remaining claims. *See AG Equipment Co.*, 2009 U.S. Dist. LEXIS 6610, at \*5 ("The Tenth Circuit has held that courts should not bifurcate trials . . . unless the issues to be bifurcated are 'clearly separable'"). Once this fact is understood -- and Defendants offer only *ipse dixit* arguments to support their unfounded assertions to the contrary -- it becomes readily apparent that bifurcation would not further convenience, expedition or judicial economy in the trial of this matter. Quite the contrary, bifurcation would cause the State tremendous prejudice by fracturing the State's presentation of its proofs. Moreover, it would necessitate the State putting on much of its evidence twice, thereby lengthening the trial of this matter rather than expediting it. Simply put, bifurcation detracts from judicial economy rather than promoting it. Finally, bifurcation will result in significant inconvenience to the State. As Defendants concede, *see* Motion, pp. 10-11, bifurcation will necessitate the State calling some of its witnesses twice. Viewed from any perspective, bifurcation would be tremendously wasteful of the parties' and the Court's resources and is inappropriate.

---

That is incorrect. The Court did not make such a finding, but simply denied Defendants' Daubert challenge to Mr. King's testimony. *See* Ex. C. to Defendants' Motion (Aug. 13, 2009 Hearing Tr. at 96:6-99:13).

**V. Conclusion**

WHEREFORE, in light of the foregoing, Defendants' Motion should be denied.

Respectfully Submitted,

W.A. Drew Edmondson OBA #2628  
ATTORNEY GENERAL  
Kelly H. Foster OBA #17067  
ASSISTANT ATTORNEY GENERAL  
State of Oklahoma  
313 N.E. 21<sup>st</sup> St.  
Oklahoma City, OK 73105  
(405) 521-3921

M. David Riggs OBA #7583  
Joseph P. Lennart OBA #5371  
Richard T. Garren OBA #3253  
Sharon K. Weaver OBA #19010  
Robert A. Nance OBA #6581  
D. Sharon Gentry OBA #15641  
David P. Page OBA #6852  
RIGGS, ABNEY, NEAL, TURPEN,  
ORBISON & LEWIS  
502 West Sixth Street  
Tulsa, OK 74119  
(918) 587-3161

Louis W. Bullock OBA #1305  
Robert M. Blakemore OBA 18656  
BULLOCK, BULLOCK & BLAKEMORE  
110 West Seventh Street Suite 707  
Tulsa OK 74119  
(918) 584-2001

Frederick C. Baker  
(admitted *pro hac vice*)  
Elizabeth Claire Xidis  
(admitted *pro hac vice*)  
MOTLEY RICE LLC  
28 Bridgeside Boulevard  
Mount Pleasant, SC 29465  
(843) 216-9280

/s/ Ingrid L. Moll

William H. Narwold

(admitted *pro hac vice*)

Ingrid L. Moll

(admitted *pro hac vice*)

Mathew P. Jasinski

(admitted *pro hac vice*)

MOTLEY RICE LLC

20 Church Street, 17<sup>th</sup> Floor

Hartford, CT 06103

(860) 882-1678

Jonathan D. Orent

(admitted *pro hac vice*)

Michael G. Rousseau

(admitted *pro hac vice*)

Fidelma L. Fitzpatrick

(admitted *pro hac vice*)

MOTLEY RICE LLC

321 South Main Street

Providence, RI 02940

(401) 457-7700

Attorneys for the State of Oklahoma

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 10th day of September, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	fc_docket@oag.ok.gov
Kelly H. Foster, Assistant Attorney General	kelly_foster@oag.ok.gov
M. David Riggs	driggs@riggsabney.com
Joseph P. Lennart	jlennart@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Robert A. Nance	rnance@riggsabney.com
D. Sharon Gentry	sgentry@riggsabney.com
David P. Page	dpage@riggsabney.com
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS	
Louis Werner Bullock	lbullock@bullock-blakemore.com
Robert M. Blakemore	bblakemore@bullock-blakemore.com
BULLOCK, BULLOCK & BLAKEMORE	
Frederick C. Baker	fbaker@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Michael G. Rousseau	mrousseau@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
MOTLEY RICE LLC	
<b><u>Counsel for State of Oklahoma</u></b>	
Robert P. Redemann	rredemann@pmrlaw.net
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.	
David C. Senger	david@cgmlawok.com
Robert E Sanders	rsanders@youngwilliams.com
Edwin Stephen Williams	steve.williams@youngwilliams.com
YOUNG WILLIAMS P.A.	
<b><u>Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.</u></b>	
John H. Tucker	jtucker@rhodesokla.com

Theresa Noble Hill	thill@rhodesokla.com
Colin Hampton Tucker	ctucker@rhodesokla.com
Kerry R. Lewis	klewis@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER & GABLE	
Terry Wayen West	terry@thewestlawfirm.com
THE WEST LAW FIRM	
Delmar R. Ehrich	dehrich@faegre.com
Bruce Jones	bjones@faegre.com
Krisann C. Kleibacker Lee	kklee@faegre.com
Todd P. Walker	twalker@faegre.com
Christopher H. Dolan	cdolan@faegre.com
Melissa C. Collins	mcollins@faegre.com
Colin C. Deihl	cdeihl@faegre.com
Randall E. Kahnke	rkahnke@faegre.com
FAEGRE & BENSON, LLP	
<b><u>Counsel for Cargill, Inc. &amp; Cargill Turkey Production, LLC</u></b>	
James Martin Graves	jgraves@bassettlawfirm.com
Gary V Weeks	gweeks@bassettlawfirm.com
Woody Bassett	wbassett@bassettlawfirm.com
K. C. Dupps Tucker	kctucker@bassettlawfirm.com
Earl Lee "Buddy" Chadick	bchadick@bassettlawfirm.com
Vincent O. Chadick	vchadick@bassettlawfirm.com
BASSETT LAW FIRM	
George W. Owens	gwo@owenslawfirmmpc.com
Randall E. Rose	rer@owenslawfirmmpc.com
OWENS LAW FIRM, P.C.	
<b><u>Counsel for George's Inc. &amp; George's Farms, Inc.</u></b>	
A. Scott McDaniel	smcdaniel@mhla-law.com
Nicole Longwell	nlongwell@mhla-law.com
Philip Hixon	phixon@mhla-law.com
Craig A. Merkes	cmerkes@mhla-law.com
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC	
Sherry P. Bartley	sbartley@mws gw.com
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC	
<b><u>Counsel for Peterson Farms, Inc.</u></b>	

John Elrod	jelrod@cwlaw.com
Vicki Bronson	vbronson@cwlaw.com
P. Joshua Wisley	jwisley@cwlaw.com
Bruce W. Freeman	bfreeman@cwlaw.com
D. Richard Funk	rfunk@cwlaw.com
CONNER & WINTERS, LLP	
<b><u>Counsel for Simmons Foods, Inc.</u></b>	
Stephen L. Jantzen	sjantzen@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
RYAN, WHALEY, COLDIRON & SHANDY, P.C.	
Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com
Thomas C. Green	tcgreen@sidley.com
Gordon D. Todd	gtodd@sidley.com
SIDLEY, AUSTIN, BROWN & WOOD LLP	
Robert W. George	robert.george@tyson.com
L. Bryan Burns	bryan.burns@tyson.com
Timothy T. Jones	tim.jones@tyson.com
TYSON FOODS, INC	
Michael R. Bond	michael.bond@kutakrock.com
Erin W. Thompson	erin.thompson@kutakrock.com
Dustin R. Darst	dustin.darst@kutakrock.com
KUTAK ROCK, LLP	
<b><u>Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., &amp; Cobb-Vantress, Inc.</u></b>	
R. Thomas Lay	rtl@kiralaw.com
KERR, IRVINE, RHODES & ABLES	
Frank M. Evans, III	fevans@lathropgage.com
Jennifer Stockton Griffin	jgriffin@lathropgage.com
David Gregory Brown	
LATHROP & GAGE LC	
<b><u>Counsel for Willow Brook Foods, Inc.</u></b>	
Robin S Conrad	rconrad@uschamber.com
NATIONAL CHAMBER LITIGATION CENTER	

Gary S Chilton	gchilton@hcdattorneys.com
HOLLADAY, CHILTON AND DEGIUSTI, PLLC	
<b><u>Counsel for US Chamber of Commerce and American Tort Reform Association</u></b>	
D. Kenyon Williams, Jr.	kwilliams@hallestill.com
Michael D. Graves	mgraves@hallestill.com
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON	
<b><u>Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.</u></b>	
Richard Ford	richard.ford@crowedunlevy.com
LeAnne Burnett	leanne.burnett@crowedunlevy.com
CROWE & DUNLEVY	
<b><u>Counsel for Oklahoma Farm Bureau, Inc.</u></b>	
Kendra Akin Jones, Assistant Attorney General	Kendra.Jones@arkansasag.gov
Charles L. Moulton, Sr Assistant Attorney General	Charles.Moulton@arkansasag.gov
<b><u>Counsel for State of Arkansas and Arkansas National Resources Commission</u></b>	
Mark Richard Mullins	richard.mullins@mcafeetaft.com
MCAFEE & TAFT	
<b><u>Counsel for Texas Farm Bureau; Texas Cattle Feeders Association; Texas Pork Producers Association and Texas Association of Dairymen</u></b>	
Mia Vahlberg	mvahlberg@gablelaw.com
GABLE GOTWALS	
James T. Banks	jtbanks@hhlaw.com
Adam J. Siegel	ajsiegel@hhlaw.com
HOGAN & HARTSON, LLP	
<b><u>Counsel for National Chicken Council; U.S. Poultry and Egg Association &amp; National Turkey Federation</u></b>	
John D. Russell	jrussell@fellerssnider.com
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, PC	
William A. Waddell, Jr.	waddell@fec.net
David E. Choate	dchoate@fec.net

FRIDAY, ELDREDGE & CLARK, LLP	
<b><u>Counsel for Arkansas Farm Bureau Federation</u></b>	
Barry Greg Reynolds	reynolds@titushillis.com
Jessica E. Rainey	jrainey@titushillis.com
TITUS, HILLIS, REYNOLDS, LOVE, DICKMAN & MCCALMON	
Nikaa Baugh Jordan	njordan@lightfootlaw.com
William S. Cox, III	wcox@lightfootlaw.com
LIGHTFOOT, FRANKLIN & WHITE, LLC	
<b><u>Counsel for American Farm Bureau and National Cattlemen's Beef Association</u></b>	
Duane L. Berlin	dberlin@levberlin.com
LEV & BERLIN PC	
<b><u>Counsel for Council of American Survey Research Organizations &amp; American Association for Public Opinion Research</u></b>	
Diane Hammons	Diane-Hammons@cherokee.org
Sara Hill	Sarah-Hill@cherokee.org
<b><u>Counsel for the Cherokee Nation</u></b>	

Also on this 10th day of September, 2009, I mailed a copy of the foregoing to:

**Thomas C Green** -- via email: tcgreen@sidley.com  
Sidley, Austin, Brown & Wood LLP

**Dustin McDaniel**  
**Justin Allen**  
Office of the Attorney General (Little Rock)  
323 Center St, Ste 200  
Little Rock, AR 72201-2610

**Steven B. Randall**  
58185 County Rd 658  
Kansas, Ok 74347

**Cary Silverman** -- via email: csilverman@shb.com  
**Victor E Schwartz**  
Shook Hardy & Bacon LLP (Washington DC)

/s/ Ingrid L. Moll  
Ingrid L. Moll